In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 955

HOWARD T. FOULKES, ADMINISTRATOR IN THE WILL OF CHARLES DURKEE, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner instituted this action in the United States Court of Claims in November 1964, seeking a judgment of $187,500,000 against the United States based upon alleged ownership by petitioner's decedent, Durkee, at the time of his death in 1870, of certain railroad bonds allegedly held by the United States (Pet. App. 1a-4a). The Court of Claims granted (Pet. App. 41a) the motion of the United States

for summary judgment (Pet. App. 4a-14a), holding that petitioner's claim was barred by the six-year statute of limitations applicable to claims cognizable by the Court of Claims (28 U.S.C. 2501), and by laches. This holding is clearly correct, and further review is not warranted.

Durkee died in 1870, and the claim here sued upon could have accrued no later than his death. That was almost a century ago; the applicable statute of limitations (28 U.S.C. 2501) is six years and there is nothing to suggest that it has been tolled.[1] For there is no indication that proper representatives of the estate were not appointed in 1870 at Durkee's death, when his will was admitted to probate (Pet. App. 2a), and in any event petitioner himself has been administrator for almost 21 years, since his appointment on May 2, 1945 (Pet. App. 1a)—far longer than the statutory period of limitations.

Nor is petitioner helped by advancing a trust theory as the basis of his claim. The period of limitations in an action for money held in trust begins to run when the trust is repudiated. *Harrison* v. *United States*, 20 Ct. Cl. 175. For present purposes, that was no later than 1914, when the Treasury, in a press release (Pet. 13a-14a) designed to warn the public against promoters who were selling interests in the

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[1] 28 U.S.C. 2501 provides in part: "A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases."

Durkee claim, stated that there was not—and never had been—any basis for such claim.[2]

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[2] The history of the Durkee claim corroborates the Treasury's statement. In 1896 a petition by one Blaisdell (a beneficiary of the estate or representative of the beneficiaries) in the Court of Claims was dismissed apparently on the ground that he was not the proper party to sue. 31 Ct. Cl. 464. In 1900, a petition in the Court of Claims (Pet. App. 9a-10a) filed by one Kuykendall, who appeared to be the administrator of the estate, was also dismissed. 35 Ct. Cl. 639. Kuykendall then brought suit in the Supreme Court for the District of Columbia against the Secretary of the Treasury and the Treasurer of the United States (Pet. App. 11a-12a); the suit was later dismissed on his motion (Pet. App. 5a-6a).

In 1903 Kuykendall brought suit to have the alleged bonds declared a first mortgage on the property of the Union Pacific Railroad. The Circuit Court of Appeals for the Eighth Circuit in *Kuykendall* v. *Union Pacific Railroad Co.*, 163 Fed. 819, reviewed the evidence submitted to show Durkee's asserted ownership of the bonds (apparently essentially the same evidence as was introduced here) and concluded that the evidence was "incoherent, disjointed, and pointless." *Id.* at 820. It further noted that it had given counsel a chance to call certain witnesses who would have been able to substantiate the claim, if true, and that counsel had refused. *Id.* at 822. Noting that it seemed "positively incredible that Mr. Durkee, who died testate in 1870, would make no mention in his will of the ownership of such a fabulous fortune," the court affirmed the dismissal of the suit. *Id.* at 822, 823.

In 1927, the conviction of three promoters of the Durkee claim for mail fraud was affirmed by the Fourth Circuit in *Stearn* v. *United States*, 18 F. 2d 465, the court noting (*id.* at 468) that "[i]t is difficult to impartially review this testimony * * * without being impressed with the fact that the so-called Durkee claim, as containing any real existence or valid charge against the government, was wholly fictitious."

We note that the *Lost Bond Case*, 5 First Comptroller's Decisions 197 (1884), cited by petitioner (Pet. 7), has no conceivable relation to this case.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

FEBRUARY 1966.

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FILED
MAR 15 1966
JOHN F. DAVIS, CLERK

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v.

THE UNITED STATES OF AMERICA, *Respondent*

REPLY TO MEMORANDUM OF RESPONDENT IN OPPOSITION

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